Supreme Court, U.S.
FILED

981789 APR 28 1999

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No.

In The

Supreme Court of the United States

October Term 1998

DANIEL M. McNEIL,

Petitioner,

vs.

STATE OF UTAH, MEDICAID SECTION,

Respondent.

Petition for Writ of Certiorari to the Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a federal statute expressly prohibits liens against Medicaid recipients, does federal supremacy require the State of Utah to refrain from imposing liens on tort recoveries of Medicaid recipients?

2. Does the State's practice of liening the tort recoveries of Medicaid recipients who have established a "special needs trust," destroy or significantly impair an important right explicitly conferred by a federal statute?

PARTIES TO THE PROCEEDING

Petitioner, Daniel M. McNeil, is a resident of the State of Utah. At the time his personal injury cause of action arose, McNeil was a minor ward of his elderly grandmother who was on social security. His substantial medical expenses were paid by Utah Medicaid, and McNeil thereby became a "Medicaid recipient."

The Respondent is the State of Utah, Medicaid Section. The Medicaid Section is an agency of the Office of Recovery Services which is a division of the Department of Human Services of Utah State Government.

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SUMMARY OF ABBREVIATIONS

MA - Medical Assistance Paid to a Recipient by the State under the Medicaid Program

R.___ - Official Record Citations

SNT - Special Needs Trust (Also, Supplemental Needs Trust or Discretionary Trust)

SSA - Social Security Act

TPL - Third-Party Liability

CONVERSION TABLE OF PARALLEL CITATIONS OF THE SOCIAL SECURITY ACT

The following is a conversion chart for the citations in the Social Security Act and in the United States Code:

Social Security Act	United States Code
§ 1902(a)(18)	§ 1396a(a)(18)
§ 1902(a)(25)	§ 1396a(a)(25)
§ 1912(a)(1)	§ 1396k(a)(1)
§ 1912(a)(2)	§ 1396k(a)(2)
§ 1917(a) & (b)	§ 1396p(a) & (b)
§ 1902(d)(4)	§ 1396a(d)(4)

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Petitioner Daniel M. McNeil respectfully requests that this Honorable Court issue a Writ of Certiorari to review the judgment of the Utah Supreme Court entered on November 27, 1998.

OPINIONS BELOW

This matter was originally determined by the trial court on summary judgment in an interpleader action. *See* Appendix C. The matter was appealed directly to the Utah Supreme Court, which held in favor of the Respondent State of Utah in a 3 to 2 decision issued November 27, 1998. *See* Appendix A, *Wallace v. Jackson, State of Utah, McNeil, et al.*, 972 P.2d 446 (Utah 1998), and Appendix M.

Upon receipt of the decision of the Utah Supreme Court, Petitioner filed a Petition for Rehearing, which was denied on January 29, 1999. *See* Appendix B.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the Utah Supreme Court dated November 27, 1998. A timely petition for rehearing was filed by the Appellant in that case, and was denied in an Order filed by the Utah Supreme Court on January 29, 1999. Appendix B. This Petition for Certiorari was filed within 90 days of the January 29, 1999 Order denying McNeil's petition for a rehearing.

Jurisdiction is invoked under 28 U.S.C. § 1257(a), which provides that this Court may review the decision of the highest court of a state of the United States of America, where "the validity of . . . a statute of the United States is drawn in question or where the validity of a statute of any state is drawn

in question on the ground of its being repugnant to . . . laws of the United States."

STATUTORY PROVISIONS INVOLVED

The major constitutional and statutory provisions involved in this case are:

1. The Supremacy Clause - United States Constitution, Article VI, Clause 2.

> This constitution, and the laws of the United States . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

(Original capitalization.)

2. Federal Anti-Lien Statute - 42 U.S.C. § 1396p(a)(1) and (b)(1).

> No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except . . . [exceptions not relevant to this case, but set forth in full in Appendix D].
>
> No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except . . . [exceptions not relevant to this case, but set forth in full in Appendix D].

See Appendix D.

3. Mandatory Compliance With § 1396p - 42 U.S.C. § 1396a(a)(18).

> A State plan for medical assistance must - (18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts;

4. State Statute Allowing Lien - Utah Code Ann. § 26-19-5(1) (1989).

> The department's claim to recover medical assistance provided as a result of such an injury, disease, or disability shall be a lien against any proceeds payable to the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs authorized under Subsection 26-19-7(4).

See Appendix E.

5. Second Statute Allowing Liens - Utah Code Ann. § 26-19-13(1) (1984).

> No lien or encumbrance shall be imposed against the property of a recipient before his death because of medical assistance correctly paid or to be paid on his behalf before he is 65 years of age, except as provided by Subsections 26-19-7(2) and (3).

6. State Lien Enforcement - Utah Code Ann. § 26-19-7(2) (1984).

> (2) If the recipient proceeds without the department's written consent as required by Subsection (1)(a), the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action. The department may recover in full from the recipient all medical assistance which it has provided and retains its right to commence an independent action against the third party, subject to Subsection 26-19-5(3).

See Appendix F.

7. State Obligation to Pursue Third Parties - 42 U.S.C. § 1396a(a)(25)(A).

> (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1167(1)]), service benefit plans, and health maintenance organizations) to pay for care and services available under the plan, including--
> . . . .

See Appendix G.

8. Federal Special Needs Trust Exemption - 42 U.S.C. § 1396p(d)(4) (1993).

> (4) This subsection [for determining assets of a trust to establish Medicaid eligibility] shall not apply to any of

> the following trusts: (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(Bracketed portion added) *See* Appendix H.

9. State Trust Exemption - Utah Code Ann. § 62A-5-110(3), (5) and (6) (1994).

> A discretionary trust[1] for a person with disabilities is not liable for reimbursement or payment to the state or any state agency, for financial aid or services provided to that individual except . . . to the extent that the trust property has been distributed directly to or is otherwise under the control of the disabled beneficiary; or [upon the death of the beneficiary] . . . . The benefits that a person with disabilities is otherwise legally entitled to may not be reduced, impaired, or diminished in any way because of contribution to a discretionary trust for that

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[1] The statutes and literature use the terms "special needs trusts," "supplemental needs trusts," or "discretionary trusts" interchangeably. These terms all mean the same thing, i.e. an irrevocable *inter vivos* trust established to fund special or supplemental needs of the injury victim not otherwise covered by Medicaid, while maintaining ongoing Medicaid coverage. Typically, the trust may not cover food, clothing or housing, but will pay for rehabilitation expenses not covered by the Medicaid program. For brevity, these trusts are simply referred to as "SNT."

> person [or] utilization of trust income to provide benefits to a disabled beneficiary. All state agencies shall disregard a discretionary trust for a person with disabilities, as defined in Subsection (1), as a resource when determining eligibility for services or support except as, and only to the extent that it is otherwise prohibited by federal law.

See Appendix I.

10. Attorneys Fees and Interest - Utah Code Ann. § 26-19-16 (1981).

> In any action brought by the department under this chapter under which it prevails, the department shall recover along with the principal sum and interest, a reasonable attorney's fee and costs incurred.

11. Conflict with Federal Law Not Allowed - Utah Code Ann. § 26-19-17 (1984).

> In no event shall any provision contained in this chapter be applied contrary to existing federal law.

STATEMENT OF THE CASE

Medicaid is a state-administered federal program to provide medical assistance ("MA") to the poor. R. 199, 464. In 1994-1995, three-quarters of the money in Utah came from the federal government and one-quarter from the state. Extensive federal statutory language both prescribes and proscribes state actions. *See* Appendices D, G, H and J. R. 199, 464.

Daniel McNeil was a 16-year-old indigent minor in October 1994, a ward of his elderly grandmother. R. 199. One night, he was a passenger in a car that struck five cows on a country road, resulting in an extremely serious, disabling brain injury. Another passenger in the vehicle was killed and a third passenger sustained a significant injury. McNeil's medical bills exceeded $100,000 (R. 657, 198), of which Medicaid paid about $43,519. R. 308.

Allstate Insurance Company insured both the driver and the cow owner, and interplead its policies, naming McNeil, the State of Utah and others as interpleader defendants. R. 3-6. Combined insurance coverage came to $85,000. R. 198-9. The State of Utah, Medicaid Section, filed an interpleader cross-claim against McNeil seeking enforcement and recovery of the State's "lien" by a personal judgment against McNeil. The State did not sue the third-party tortfeasor. R. 45-47. *See* Appendix L.

The State and McNeil filed cross motions for summary judgment. R. 194, 269. The State claimed a lien for Medicaid benefits paid of approximately $43,519 by the time of the motion, plus attorneys fees and costs. R. 272-294. The State relied on the Utah lien and attorneys fee statutes, Utah Code Ann. §§ 26-19-5(1) & -7(2) and § 26-19-16, respectively. McNeil responded that 42 U.S.C. § 1396p(a) and (b) expressly prohibit the State from imposing a lien or seeking recovery in any way against the recipient for benefits correctly paid. McNeil additionally claimed that 42 U.S.C. § 1396p(d)(4) explicitly allows a Medicaid recipient to establish an SNT to receive the proceeds of a third-party tort settlement, maintain ongoing Medicaid eligibility, and defer any reimbursement to the State until after the recipient's death, thus delaying any reimbursement until McNeil's death. R. 197-268.

The State District Court granted the State a priority, first-dollar lien of $43,519, and additionally awarded attorneys fees, interest and costs against McNeil in the sum of $4,920.29. R. 611, 645, 671. The Court also denied McNeil's motion for summary judgment, which asserted the supremacy of the federal anti-lien and special needs trust statutes. R. 656-659.

McNeil's guardian had properly "assigned" to the State his rights against liable third parties to collect for medical expenses paid by the State.[2] R. 418-9, 461. However, this assignment did not include, nor could it legally include, McNeil's other claims, such as lost wages, future impaired earning capacity, medical expenses not paid by the State and pain and suffering, which could easily have a value of $1,000,000. R. 286-87, 570. Thus, the $85,000 third-party insurance proceeds were woefully insufficient to satisfy the State's lien and McNeil's substantial other claims noted above. R. 506, 376.

The federal anti-lien statute **prohibits state liens** or recoveries against a *living Medicaid recipient* for benefits *correctly paid.* Statutory Provision No. 2; R. 201. No claim is made by the State that McNeil was incorrectly paid any Medicaid benefits. R. 506; 372-6, esp. ¶¶ 14-16. The Utah Medicaid statute **allows liens** against recipients. Statutory Provision Nos. 4, 5 and 6; R. 248. Accordingly, the State of Utah's cross-claim sought a money judgment for the amount of its lien against "proceeds payable to Daniel McNeil." R. 45-47; *See* Appendix L.

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[2] The Office of Recovery Services ("ORS") is the agency within the Department of Human Services that contracts with the Department of Health to recover monies claimed to be owed to the Medicaid Section.

The State Court established an SNT for McNeil. R. 762, 772 (rev. side). The State had notice of the intent to establish this trust, which was intended to receive the proceeds of McNeil's TPL settlement. R. 365-6, ¶ 8.

McNeil appealed to the Utah Supreme Court from the District Court's order granting the State's motions for summary judgment and for attorneys fees and costs and denying McNeil's motion for summary judgment. R. 623-26. All of the federal issues discussed above were briefed and argued before the Utah Supreme Court. *See* Appendix A. The Utah Supreme Court held that the federal anti-lien statute, § 1396p (a) and (b), was not in conflict with the state lien statute. *See Wallace v. Jackson, State of Utah, McNeil, et al.*, 972 P.2d 446, 448 (Utah 1998).[3] The majority was of the opinion that prohibiting the assessment of a lien under § 1396p(a) would be in conflict with the federal assignment statute, 42 U.S.C. § 1396a(a)(25)(A) (*see* Appendix G), "which mandates states to seek reimbursement from third parties who are legally liable for the medical payments." *Id.* To solve the "conflict," the Court adopted the extremely novel approach of simply redefining a personal injury settlement as ***"not . . . McNeil's property."*** *Id.* (emphasis added). Because McNeil's settlement is allegedly not his property, "the federal anti-lien statute is not violated when the State seeks reimbursement in an interpleader action." *Id.* In support of this bizarre theory, the Utah Supreme Court cited as authority only "the State's brief." *Id.*

The Utah Supreme Court also rejected McNeil's argument that the SNT should delay any State reimbursement

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[3] The case is captioned as *"Wallace v. Jackson"* because the appeal arose from the cross-claim of one interpleader defendant (the State) against another interpleader defendant (McNeil).

until his death, citing the companion case of *S.S. v. State,* 972 P.2d 439 (Utah 1998) (which dealt only with the special needs trust issue). Appendix M. The Court held "that repayment of the Medicaid lien from third-party settlement funds ***must precede the creation*** of the supplemental needs trust." *Wallace,* 972 P.2d at 448 (emphasis added).

The two dissenting justices in *Wallace* ardently disagreed with the three-member majority on both issues. The dissent noted that the State's Medicaid law "provide[s] for the State to recover, through a lien on recipients' property," and that the federal statute clearly "conflicts with the state statute and prohibits the State's actions in this case." *Id.* at 449. The dissent strongly rejects the majority's linchpin argument about McNeil's non-ownership of his own settlement:

> The majority achieves an "end run" around this [§ 1396p(a) anti-lien] prohibition through what seems to me the illogical conclusion that the proceeds in dispute are not really McNeil's property, but perhaps his grandmother's or even the State's.

Id. (bracketed portion added). Section 1396p(a) "clearly states" that no lien may be imposed against a recipient and this "expressly applies to any property. . . ." *Id.* Accordingly, "the majority's result arbitrarily deprives McNeil of his property." *Id.* Furthermore, "the State should not be allowed to pursue [its goal of protecting public money] at the expense of persons Congress sought to protect in creating prohibition against liens of this kind." *Id.* at 450 (bracketed portion added).

The dissent found no conflict with § 1396a(a)(25), which merely mandates that the states ascertain the *"legal liability of third parties."* *Id.* at 450 (italics in original). There are several examples where the federal statutes are clear that

states are to pursue third-party liability ("TPL") claims against third parties, and not against the Medicaid recipients. *Id.* Congress obviously intended that Medicaid recipients not be forced "to defend against liens" because that would be "inconsistent with the entire benefit system created by the federal statutes." *Id.* at 451.

The dissenting justices in *Wallace* likewise dissented in the companion case of *S.S. v. State, supra,* on the SNT issue. The dissenters would hold that an SNT protects McNeil against the State's lien claim in this case:

> Once [the recipient's] recovery from the persons liable for his injuries was contributed to a properly created supplemental needs trust, the State had no power to attach it until his death, just as is true of any other funds contributed to that trust.

S.S. v. State, 972 P.2d at 445 (bracketed words added).[4]

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Utah Supreme Court decision in this case is directly contrary to an important provision of federal Medicaid law. A significant federal supremacy issue is at stake. In the words of the Honorable Associate Chief Justice Christine Durham, dissenting:

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[4] The Court considered *Wallace* and *S.S. v. State* as companion cases, hearing oral argument and issuing the opinions on the same dates. *Wallace* involved both the illegal lien and SNT issues, where as *S.S. v. State* involved only the SNT issue. It is clear that the *Wallace* majority intended the *S.S.* case to explain its ruling rejecting McNeil's SNT trust argument. *Wallace*, 972 P.2d at 448, citing *S.S. v. State.*

> Therefore, McNeil argues, the federal statutes preempt the state statutes, making the lien against McNeil invalid . . . . The majority holds that no such contradiction exists and that no cause for preemption has been raised. I disagree. I would hold that our state statutes do contradict provisions of federal Medicaid law and that federal law controls. . . . The State bases its cross-claim against McNeil on Utah Code Ann. §§ 26-19-5(1) & - 7(2). ***Because these sections directly contradict federal law, 42 U.S.C. § 1396p(a), the State's liens should be declared illegal under Utah Code Ann. § 26-19-17.*** . . . The State's lien is unenforceable.

Wallace, 972 P.2d at 449, 452 (emphasis added). Additionally, the Utah Supreme Court's decision emasculates a federally-mandated right which allows placement of a TPL tort settlement into a special needs trust, and protects the same from a state's lien and other recovery efforts. *Wallace,* 972 P.2d at 448; *S.S. v. State,* 972 P.2d at 444, 445 (majority's "result is contrary to both federal and state law").

Finally, granting certiorari is important because of the significant inconsistency in state and lower federal court decisions. Some decisions have interpreted § 1396p (a) and (b) (or their predecessors) as prohibiting liens and recoveries while others have allowed liens. If the recent trend is allowed to continue, the anti-lien and pro-special-needs trust provisions of federal law will become meaningless to tens of thousands of Medicaid recipients who have third-party claims.

POINT I

— Federal Supremacy at Issue —

WHERE A FEDERAL STATUTE EXPLICITLY PROHIBITS THE IMPOSITION OF LIENS AGAINST MEDICAID RECIPIENTS, FEDERAL SUPREMACY REQUIRES STATES TO REFRAIN FROM IMPOSING SAID LIENS.

A. Federal Statutes Preempt Conflicting State Statutes

Supreme Court review is appropriate when federal supremacy is at stake. This case raises a significant issue of federal supremacy. The United States Constitution provides that all federal laws "shall be the Supreme Law of the Land . . . ." U.S. Const. Art. VI, cl. 2. The Supremacy Clause may preempt state laws on the same subject thereby rendering such laws ineffective. Where an "act of Congress fairly interpreted is in actual conflict with the law of the state," the state law must yield. *Savage v. Jones,* 225 U.S. 501, 533 (1912). A court reviewing the constitutionality of a state law with respect to the Supremacy Clause must first ascertain Congress' intent in enacting the federal statute at issue, for if the plain and inevitable effect of the state statute is to impair the operation of the federal statute, the state statute must be struck down. *United States v. James,* 478 U.S. 597, 604 (1986) ("the starting point in statutory interpretation is the language [of the statute] itself").

Medicaid is a cooperative federal-state program established to provide medical services to the country's poor. *Connecticut v. Murtha*, 427 A.2d 807, 810 (Conn. 1980). By participating in the program, the State receives substantial federal monies and, in turn, agrees to comply with the program

requirements as established by Congress. *Id. See also Forsythe v. Rowe*, 629 A.2d 379 (Conn. 1993) (states' participation was voluntary, but a plan must conform with requirements of federal law once program is adopted). The State of Utah is a federal Medicaid participant. Utah Code Ann. § 26-19-2(6) (1993) and § 26-18-2(4) (1994). It has adopted a "state plan" under Title XIX of the Social Security Act ("SSA"). Utah Code Ann. § 26-19-2(7) and § 26-18-2.1, 2.3 and 3.

Utah's Medicaid plan must incorporate the federal requirements and comply with all federal Medicaid laws and regulations. 42 U.S.C. § 1396a. Therefore, if a federal statute prohibits liens against a Medicaid recipient's personal property, and provisions of Utah's Medicaid Benefit Recovery Act (Utah Code Ann. §29-19-1, *et seq.*) permit said liens, the state provisions are preempted and void under the Supremacy Clause.

B. Federal Law Expressly Prohibits the State Lien Against McNeil

In this case, federal anti-lien statutes expressly prohibit states from imposing liens and recoveries against the personal property of Medicaid recipients:

> ***No lien** **may be imposed against the property of any individual*** prior to his death on account of medical assistance ***paid or to be paid*** on his behalf under the State plan, except . . . [exceptions not relevant].
>
> ***No adjustment or recovery*** of any medical assistance correctly paid on behalf of an individual under the State's plan ***may be made***, except . . . [exceptions not relevant].

42 U.S.C. § 1396p(a)(1) and § 1396p(b)(1) (emphasis added). *See* Appendix D. A state Medicaid plan **must** "comply with the provisions of Section 1917 [42 U.S.C. § 1396p] with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts." 42 U.S.C. § 1396a(a)(18). Nevertheless, Utah permits "liens":

> The department's claim to recover medical assistance provided as a result of such an injury, disease, or disability ***shall be a lien against any proceeds payable to the recipient*** by that third party. This ***lien*** has ***priority*** over all other claims to the proceeds . . . .

Utah Code Ann. § 26-19-5(1) (1994) (emphasis added). Since Utah's plan specifically allows liens against the property of Medicaid recipients, it violates federal law and is void.

The federal exceptions to the no-lien provisions of Section 1396p(a) and (b) are narrow and clear (inpatients in nursing facilities, clerical errors and the like). None of the exceptions apply to this case, as acknowledged below by the State and the Utah Supreme Court ("exceptions not relevant to this case"). *Wallace,* 972 P.2d at 447. No other provision of the federal statutory scheme authorizes a lien against a recipient's property. Therefore, the State violated federal law by suing McNeil directly for reimbursement under the lien.

The United States Supreme Court must protect unambiguous federal statutes from state encroachment. This Court has previously stated:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should

> always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . ***When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."***

Connecticut National Bank v. Germain, 503 U.S. 249, 253-4 (1992) (emphasis added; citations omitted). "[I]f the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 81 L.Ed. 2d 694, 104 S.Ct. 2778 (1984).

C. The Assessment of Attorneys Fees and Costs Constitutes a Prohibited Assessment or Recovery

The trial court assessed $4,920.29 in attorneys fees and court costs against 17-year-old Daniel McNeil as a cost of collecting its illegal lien. R. 611, 645, 671. This simply compounds the illegality, because § 1396p(b) explicitly prohibits assessments and recoveries against Medicaid recipients. Why else would the federal statute be enacted if it wasn't meant to protect indigent recipients like Daniel McNeil from some type of collection action or assessment? If Utah is allowed to assess attorneys fees, interest and costs against indigent recipients, other states will follow suit.

This Court should grant certiorari and decisively reject the notion that states may assess attorneys fees, costs, or any other kind of recoveries against Medicaid recipients who have been correctly paid.

POINT II

— Conflicting Case Law —

THE PRACTICE OF ASSESSING ILLEGAL MEDICAID REIMBURSEMENT LIENS IS WIDE-SPREAD, ADDRESSED INCONSISTENTLY BY COURTS AND SUBJECT TO CONTRADICTORY AGENCY INTERPRETATIONS.

A number of cases have upheld the anti-lien provisions of § 1396p and its predecessors. Other cases have ignored the federal anti-lien statute or held that state reimbursement liens have priority over the SNT. As a result, there is significant inconsistency in the case law as well as hostile interpretations of federal statutes. This threatens the federal purpose of these statutes, which is to protect the indigent Medicaid recipients. Accordingly, it is very important for this Court to speak definitively on this issue. A sampling of the cases demonstrates the confusion and inconsistency.

A. Cases Upholding Federal Anti-Lien Law

In *Connecticut v. Murtha,* 427 A.2d 807 (Conn. 1980), the Connecticut Supreme Court addressed whether a state Medicaid reimbursement law could be used to impose a lien against a recipient's interest in her sister's estate. *Id.* at 809-10. The statute at issue provided the State with "a claim, which shall have priority" over all other claims. Relying upon the predecessor to § 1396p(a) and the Supremacy Clause, the Connecticut Supreme Court reversed the trial court and held:

> The text of 42 U.S.C. §1396a(a)(18) [now § 1396p(a)] indicates that the design of the statute is to prohibit, or strictly to limit in circumstances not applicable to the

> stipulated facts of the present case, efforts by states to recoup from beneficiaries under title XIX amounts paid for medical assistance to those beneficiaries during their lifetimes and also to prevent a participating state from recovering for any assistance correctly paid even from the estates of beneficiaries. . . . Thus, the state is precluded from seeking restitution, pursuant to [the above statute], of any funds correctly expended on [the recipient's] behalf under the title XIX program during her lifetime.

Id. at 810. *See also Moore v. Nassau County Dept. of Pub. Trans.*, 357 N.Y.S. 2d 652 (N.Y. Sup. Ct. 1974) ("federal law [§ 1396a(a)(18), the predecessor to § 1396p(a)] prevents a medical assistance recipient's claims for personal injury from being subject to liens"). *Id.* at 657 (bracketed portion added).

In *Citizen's Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989), *cert. den.* 494 U.S. 1056 (1990), a federal appeals court confronted an issue of striking similarity to the case *sub judice*. The California Department of Health Services asserted liens against the real property of survivors of deceased Medicaid recipients, which had passed by joint tenancy with right of survivorship to persons who formerly held the joint tenancy with the MA recipient. The Ninth Circuit framed the issued as follows:

> Plaintiffs . . . argue that Congress's use of the word "estate" in the recoupment provision limits a state's recovery to property which descends to the recipient's heir or the beneficiaries of the recipient's will upon death. Because the property California seeks to reach passes by right of survivorship -- thereby bypassing probate altogether -- ***they argue that the California***

> ***statute is impermissibly broad and is inconsistent with federal law. We agree.***

Id. at 1005 (emphasis added). The court first looked to the "plain meaning" of § 1396p(b)(1)(B), which expressly forbids any "adjustment or recovery," except "from [the] *estate*" of an individual 65 years of age or older. (emphasis supplied). *Id.* at 1006. Joint survivorship property was not, at common law, part of an individual's "estate." Therefore, the California statute was asserting recovery outside the permissible scope of the recipient's "estate," *Id.*, and "is impermissibly broad and is inconsistent with federal Medicaid law." *Id.* at 1008.

In *Dalzin v. Belshe,* 993 F.Supp. 732 (N.D.Cal. 1997), each plaintiff had a severely disabled sibling, and both children survived a parent who had been a Medicaid recipient. In each case, the parent left part of the estate to the disabled child and part to the healthy child. Under 42 U.S.C. § 1396p(b)(2), state reimbursement from an elderly recipient's estate is prohibited where the decedent leaves a surviving child who is "permanently and totally disabled." § 1396p(b)(1). However, California Medicaid law allowed "the State to seek recovery from the portion of the estate devised to surviving children who are not . . . disabled." *Id.* at 733. The federal district court found that this interpretation was certainly reasonable from a policy standpoint, but "it is not what the law says." *Id.* at 734. It held:

> The court simply cannot rule that Congress did not mean for the law to be read as written, but instead intended an alternate meaning that Congress could have easily expressed in other terms.

Id. Accordingly, the court struck down California's "proportionate share" system as "inconsistent with federal law." *Id.* at 733.

In *White v. Sutherland*, 585 P.2d 331 (N.M. App. 1978), the plaintiff was rendered quadriplegic by the careless acts of a chiropractor who tendered his $100,000 policy. The State paid $39,000 in medical benefits and asserted a reimbursement lien for the first $39,000 of the settlement proceeds, claiming it was "subrogated to any right of the recipient against a third party for recovery of medical expenses . . . ." *Id.* at 334. Relying on the earlier anti-lien predecessor to § 1396p,[5] the New Mexico court refused to enforce the lien, opting instead for an equitable division of the settlement money based roughly on proportions.[6] *Id.*

Earlier SNT cases also upheld the principle that an SNT would protect the recipient from a Medicaid lien until after the termination of the trust. *See Matter of Link v. Smithtown,* 620 N.Y.S. 2d 729 (N.Y. Sup. Ct. 1994), and *Samerson v. Mather*

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[5] A "no lien provision" has been part of federal law in some form since passage of Title XIX in 1965. In earlier versions of the law, the no lien provisions currently in § 1396p(a) and (b) were apparently found at different times in Subsections 1396a(a)(17), (a)18, and (a)(25).

[6] The State in *White* received an award of $10,000, with the balance of $65,000 (after attorneys fees) for the plaintiff. It is appropriate that states share proportionately in a TPL recovery, and McNeil is not advocating that the State should take nothing in this case. When certiorari is granted, it will be appropriate to explore at length the remedies and equities of the parties. Briefly, the State and any injured recipient will both have claims and share proportionately in any TPL settlement, in similar fashion to other situations in the law (e.g., bankruptcy, business liquidations, etc.) where the funds are insufficient to pay all the claims.

Memorial Hosp., 632 N.Y.S. 2d 948 (N.Y. Sup. Ct. 1995). These latter two cases, however, have been overruled in New York, as noted below.

B. Cases Hostile to Federal Anti-Lien Statutes

Several federal and state courts have held that Medicaid liens must be repaid prior to putting the money into a federally-authorized special needs trust. This destroys the federal purpose underlying the SNT. Furthermore, although these cases dealt with the SNT issue, the dicta imply strongly that the federal statute does not protect the recipient from a State Medicaid lien. For example, *Cricchio v. Pennisi*, 683 N.E. 2d 301 (N.Y. 1997), held that a Medicaid lien could be satisfied from a personal injury settlement before transfer to a special needs trust, despite the contrary language of § 1396p(d)(4)(A), which defers payment of the lien until the Medicaid recipient has passed away. *Id.* at 308. Further, although § 1396p(a) was not directly at issue, the court nevertheless commented that allowing lien reimbursement against the recipient would not conflict with § 1396p(a) because "the lien on the settlement proceeds ***attaches to the property of the third party,*** and thus does not violate the statutory prohibition against imposing a lien against a beneficiary's property until after his or her death . . . ." *Id.* at 305 (emphasis added). *Wallace* cited *Cricchio* and followed its reasoning. *See Wallace,* 972 P.2d at 448.

Cricchio has been the seed of other bad fruit in the vineyard. In *Norwest Bank of North Dakota v. Doth,* 969 F.Supp. 532 (D.Minn. 1997), the court relied upon *Cricchio* and held that a Medicaid recipient may not fund a special needs trust prior to paying the Medicaid lien. The Eighth Circuit affirmed. *Norwest Bank of North Dakota v. Doth,* 159 F.3d 328 (8th Cir. 1998). While relying only on the SNT language of § 1396p(d)(4)(A), the court's holding was extremely broad:

> Thus, a state may require a Medicaid lien imposed on the proceeds of a personal injury award or settlement to be satisfied before the remaining funds are placed in an SNT.

Id. at 333. Several other cases have likewise upheld Medicaid lien reimbursement prior to placement of the funds in a § 1396p(d)(4)(A) special needs trust. *Payne v. North Carolina,* 486 S.E. 2d 469 (N.C. App. 1997); *In Re Estate of Calhoun v. Illinois Department of Public Aid,* 684 N.E. 2d 842 (Ill. App. 1997); *Sullivan v. County of Suffolk,* 1 F.Supp. 2d 186 (E.D.N.Y. 1998); *State of Florida v. Estabrook,* 711 So. 2d 161 (Fla. App. 1998); and *Cuello v. Valley Farm Workers Clinic, Inc.,* 957 P.2d 1258 (Wash. App. 1998).[7]

Although technically dealing only with the SNT issue, these cases all proceed from the general assumption that Medicaid reimbursement liens against recipients are valid. To allow this assumption to go uncorrected would greatly damage many Medicaid recipients, and undermine important federal rights.

C. Conflicting Agency Interpretations

The Health Care Financing Administration ("HCFA") is the federal agency that monitors the Medicaid program in the states. Some 1996 communications from high-ranking HCFA officials favored McNeil's position. *Wallace,* 972 P.2d at 451

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[7] As this brief goes to press, we have learned of two recent decisions, yet to be published and without LEXIS citations, which require payment of the Medicaid lien prior to transfer of settlement funds to an SNT. *See Calvanese v. Calvanese,* __ N.E. 2d __ (N.Y. 4/6/99) (New York Law Journal, 4/7/99), and *Sullivan v. County of Suffolk, et al.,* ___ F.3d ___ (2nd Cir. 4/23/99).

(discussion of memorandum from Sally K. Richardson, Director of the Medicaid Bureau, to all state Medicaid directors). However, HCFA is apparently taking a different position at the present time in favor of liens against Medicaid recipients. *Id.* at 452; *Cricchio,* 683 N.E. 2d at 306. This contradictory HCFA position is not surprising since HCFA is the federal agency charged with recouping, and helping states to recoup, Medicaid expenditures. Given the incredible expense of the program for federal and state government, this Court can imagine the enormous political pressure for "friendly" HCFA interpretations that will allow lien recoupment despite contrary federal anti-lien statutes. It is therefore important for this Court to grant certiorari and uphold the supremacy of the federal anti-lien statutes.

POINT III

— A Settlement is Protected Property —

UTAH CANNOT EVADE THE FEDERAL ANTI-LIEN STATUTES BY AN UNPRECEDENTED DETERMINATION THAT A THIRD-PARTY TORT SETTLEMENT IS NOT THE PROPERTY OF THE INJURED PERSON.

The *Wallace* opinion hangs by a slender thread. The Court claims to resolve an alleged "conflict"[8] between the federal anti-lien and assignment statutes by finding that if "that part of the insurance proceeds assigned by McNeil's guardian

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[8] Of course, there is no "conflict" between the two statutes because § 1396p(a) prohibits liens against **recipients**, and § 1396a(a)(25)(A) mandates collection activity against "**third parties**." *Wallace*, 972 P.2d at 450. A state can certainly pursue a "third party" without liening a recipient.

to the State ***are considered to not be McNeil's property, harmony is achieved."*** *Id.* at 448. The only "authority" for this novel proposition, amazingly, is an unsupported passage from "the State's brief." *Id.* The dissent criticized this unsupported *ipse dixit* statement as an "end run" around the federal anti-lien statute, an "illogical conclusion" and "unrealistic." *Id.* at 449, 450.

Under Utah law, money is property, as is the right to receive money. Daniel's right to receive money is a "chose in action," or the "right to receive or recover . . . damages on a cause of action . . . for a tort or omission of a duty." Black's Law Dictionary, p. 219 (5th Ed. 1979). A Utah "rules of construction" statute confirms that the right to recover in a personal injury action is personal property. "Personal property" is "every description of money, goods, chattels, effects, ***evidences of rights in action*** . . . by which any ***pecuniary obligation*** . . . ***is created*** . . . and every right or interest therein." Utah Code Ann. § 68-3-12(1)(p) (1994) (emphasis added). An injury obviously creates a "pecuniary obligation" for the injured party.

Furthermore, the Utah Private Property Protection Act of 1994 defines "private property" as including "any . . . personal property in this state that is protected by either the Fifth or Fourteenth Amendment of the Constitution of the United States or Article I, Section 22 of the Utah Constitution." Utah Code Ann. § 63-90-2(3). Additionally, the Utah Constitution provides that the courts shall be open to every person "for an *injury* done to him and his person . . . [and] *shall have remedy* by due course of law." Constitution of Utah, Article I, Section 11 (emphasis added). There is, therefore, ample evidence in Utah statutes that McNeil's tort case and settlement are protected private property.

The lien clearly attacks McNeil's "property." The "proceeds payable" to which the State's lien attaches under Utah Code Ann. § 26-19-5(1) are limited to those payable "to the recipient." After the settlement, the State took the first $43,000 of McNeil's $85,000 settlement. R. 685i. "Proceeds payable" obviously refers to funds generated after legal resolution of the recipient's cause of action. *Murtha*, 427 A.2d at 810. Thus, the State's lien was "imposed against the property of . . . [Daniel McNeil] prior to his death on account of medical assistance paid . . . on his behalf under the State plan," all contrary to federal law (paraphrasing § 1396p(a)(1)).

The *Wallace* majority claims that the lien "*attaches to the property* of the third party, and thus does not violate the statutory prohibition against imposing a lien against a beneficiary's property . . . ." *Wallace*, 972 P.2d at 448, quoting *Cricchio*, 683 N.E.2d at 305 (emphasis added). Of course, this is facially preposterous for two reasons. First, every relevant federal and Utah statute provides only a *right to assert a claim against - not to lien - the third party.* For example, § 1396a(a)(25) provides that the "state will take all reasonable measures to ascertain the ***legal liability of third parties . . .***" (emphasis added). Second, any assertion of the State's lien directly against the third party without a pre-deprivation hearing would be presumptively unconstitutional. *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection"). Allowing a "lien" against the property of a third party tortfeasor, *sans* a hearing, would clearly violate that tortfeasor's due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

This Court has on several occasions held that a chose in action is a protected property right. In *Richards v. Jefferson*

County, 517 U.S. 793, 804 (1996), this Court observed: "to conclude that the suit may nevertheless be barred by the prior action in *Bedingfield* would thus be to deprive petitioners of their 'chose in action,' which we have held ***to be a protected property interest in its own right.***" (Emphasis added; citations omitted.) *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs").

Under both Utah and federal law, McNeil's right to receive the settlement proceeds, before or after settlement, is a property right entitled to constitutional protection. The proceeds therefore cannot be liened by the State of Utah without violating § 1396p(a) and (b). It is important that this Court grant certiorari and affirm that personal injury settlements of medicaid recipients constitute a property right entitled to protection. Otherwise, important federal rights to be free from liens and to establish an SNT will be eroded and destroyed.

POINT IV

— The Federal SNT is Threatened —

A FEDERAL STATUTE ALLOWS A MEDICAID RECIPIENT TO ESTABLISH A SPECIAL NEEDS TRUST AND DEFER STATE REIMBURSEMENT UNTIL AFTER THE RECIPIENT'S DEATH.

The language of § 1396p(d)(4)(a) is unambiguous. It allows Medicaid recipients to create special needs trusts, maintain continuing Medicaid eligibility and reimburse the State for ongoing expenditures at death. Utah's corresponding state statute affirms that the corpus of the trust is not to be considered an asset in determining Medicaid eligibility. Utah

Code Ann. § 62A-5-110. This bespeaks a clear federal policy to allow the recipient to fund the SNT with the proceeds of a personal injury settlement and protect that TPL tort settlement by delaying state reimbursement.

It would be grossly inconsistent for Congress to enshrine the principle of the SNT as a device to protect the tort settlement from any liens after it has been put into the trust, but ambush it, and perhaps obliterate it, by allowing states to lien TPL tort settlements before they get to the trust. McNeil's case is a good example. The State paid $43,000 of McNeil's medical bills and claimed a lien on the first $43,000 of the total $85,000 available. That left McNeil a very small amount after attorneys fees and costs to pay for the many therapies and medical expenses not covered by Medicaid, not to mention his other damages.

Assume for a moment that Medicaid had paid $90,000 instead of $43,000. The lien would have taken the entire settlement, which would have left nothing for the trust. In effect, this practice (validated by *Wallace* and *Cricchio*) would emasculate the federal policy established by the special needs trust and anti-lien provisions of federal law. All of the recent SNT cases cited in Point II.B above have explicitly rejected the federal purpose of the SNT by allowing reimbursement liens before the SNT is funded. They also implicitly reject the anti-lien provisions of § 1396p(a) and (b) by elevating the State's lien to a priority over the rights of the recipient. This Court must speak decisively to protect the federal SNT from state encroachment.

CONCLUSION

Third-party tort recoveries for Medicaid recipients are very common. The assertion of state Medicaid liens against

these recoveries as a priority, first-dollar reimbursement has become almost universal. McNeil is one of many victims of this practice. Additionally, many of these tort victims establish an SNT under the federal statute, particularly among the more seriously injured and the poor. State liens are being collected prior to placement of the funds in the SNT, threatening this important federal right.

The federal anti-lien statute is explicit. It forbids liens on Medicaid recipients. It makes no exception for third-party tort recoveries. "No lien" means exactly that, "no lien." "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." *Brogan v. U.S.*, 552 U.S. 398, 139 L.Ed.2d 830, 840 (1998).

Important issues of federal supremacy are at stake in this case. It is therefore critical for this Court to grant certiorari and firmly establish that the indigent poor are entitled to federal protection from state lien collection activities. It must also be firmly established that a Medicaid recipient's SNT may not be emasculated by state Medicaid reimbursement liens.

Respectfully Submitted,

s/ Robert B. Sykes
Robert B. Sykes, Esq.
Attorney for Petitioner

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[APPENDIX A]

David Spencer Wallace and Allstate Insurance Company, Plaintiffs, v. Estate of Nichole Jackson, Daniel McNeil, Emily Nelson, Keejoe Attakai, State of Utah Medicaid Section, and John Does I-XX, Defendants. State of Utah, Medicaid Section, Cross-Claimant and Counterclaim Defendant, v. Daniel M. McNeil, Cross-Claim Defendant and Counterclaimant.

No. 960028

SUPREME COURT OF UTAH

972 P.2d 446; 1998 Utah LEXIS 84; 357 Utah Adv. Rep. 11

November 27, 1998, Filed

SUBSEQUENT HISTORY: [**1]

Application for Rehearing Denied January 29, 1999. Released for Publication February 23, 1999.

PRIOR HISTORY: First District, Box Elder County. The Honorable Ben H. Hadfield.

DISPOSITION: Judgment affirmed.

CORE TERMS: medicaid, recipient

COUNSEL: Jan Graham, Att'y Gen., Linda Luinstra, Asst. Att'y Gen., Salt Lake City, for the State.

Robert B. Sykes, Matthew H. Raty, Salt Lake City, for McNeil.

JUDGES: Justice Zimmerman and Justice Russon concur in Chief Justice Howe's opinion. Justice Stewart concurs in Associate Chief Justice Durham's dissenting opinion.

OPINION BY: HOWE

OPINION:
[*447] HOWE, Chief Justice:

Daniel M. McNeil appeals from a summary judgment granted by the district court enforcing the State's lien against insurance proceeds he recovered as a result of an automobile accident in which he was injured. The court also awarded the State attorney fees and costs.

McNeil was a passenger in an automobile which was involved in an accident. He sustained severe brain injuries with permanent effects and profound neurological deficits. At the time of the accident, he was sixteen years of age and resided with his seventy-six-year-old grandmother and legal guardian, Lilian McNeil, who had raised him from infancy. She was a recipient of social security benefits, [**2] and McNeil was eligible for Medicaid assistance. As a condition to receiving Medicaid benefits, the guardian, pursuant to Utah Code Ann. § 26-19-4.5, assigned to the State McNeil's rights against third parties liable for his medical expenses.

The persons liable for McNeil's injuries were insured by Allstate Insurance Company, but the insurance proceeds were insufficient to satisfy all the potential claims of persons injured or killed in the accident. Therefore, Allstate filed this interpleader action requiring all persons involved in the accident to present their claims at one time so the court could divide the limited proceeds. Prior to Allstate's filing this

interpleader action, the State had given Allstate notice of its assignment from McNeil. The interpleader action named the State and McNeil as defendants, and the State cross-claimed against McNeil to recover the part of the proceeds payable to him by Allstate. The State did not make a claim directly against Allstate. Subsequently, Allstate settled with all parties, and McNeil received $85,000. The district court awarded the State $43,000 of that amount for reimbursement of medical expenses it had paid on McNeil's behalf through [**3] the Medicaid program. The court then placed the remainder in a special needs trust for McNeil. He appeals.

McNeil first contends that *42 U.S.C. § 1396p*(a)(1) prohibits the State from asserting a lien or seeking recovery against him for Medicaid benefits paid on his behalf. That subsection provides:

> (1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except . . . [exceptions not relevant to this case].

He asserts that Utah Code Ann. § 26-19-5(1) violates the foregoing federal statute wherein section 26-19-5(1) provides that the State's claim to recover for medical assistance furnished shall be a lien against any proceeds payable to the recipient by a third party. McNeil argues that the State may seek reimbursement directly from a third party who is legally liable for the medical assistance, but the State may not proceed as it did in the instant case against the recipient. [*448] In so doing, McNeil argues that the State has violated *42 U.S.C. § 1396p*(a)(1).

There is no merit to this contention. In a companion case which we have decided today, *S.S. [**4] v. State,___ P.2d ___, 1998 Utah LEXIS 87 (Utah 1998),* we held that payments made by a third party do not legally become the property of the recipient until after a valid settlement which must include reimbursement to the State for Medicaid benefits. In that case, we relied upon a decision of the New York Court of Appeals in the consolidated appeals of *Cricchio v. Pennisi and Link v. Town of Smithtown, 90 N.Y.2d 296, 683 N.E.2d 301, 660 N.Y.S.2d 679 (1997).* There, the court stated that as a consequence of the mandatory assignment,

> the settlement proceeds are resources of the third party tortfeasor that are owed to [the state recovery office]. Accordingly, the lien on the settlement proceeds attaches to the property of the third party, and thus does not violate the statutory prohibition against imposing a lien against a beneficiary's property until after his or her death. The flaw in plaintiff[s'] theory that the lien cannot be satisfied until the recipient's death is that it fails to appreciate this critical distinction between the assets of a responsible third party and assets belonging to the Medicaid recipient.

683 N.E.2d at 305 (citations omitted).

In [**5] enacting *42 U.S.C. § 1396*--the anti-lien statute –Congress could not have intended to prohibit or inhibit third-party recoveries which it directed in the same Social Security Act. Once the assignment has been made, it does not matter whether the State proceeds directly against the third-party tortfeasor or whether the State simply seeks its share of the insurance proceeds paid into court in an interpleader action such as occurred in the instant case.

As part of the Social Security Act, *42 U.S.C. § 1396p*(a)(1) has coexisted for many years with *42 U.S.C. § 1396a*(a)(25)(A), a sister section in the Act, which mandates states to seek reimbursement from third parties who are legally liable for the medical payments. It is a familiar principle of statutory construction that sections of a statute should be harmonized wherever possible to avoid any conflict between them. Here, if that part of the insurance proceeds assigned by McNeil's guardian to the state are considered to not be McNeil's property, harmony is achieved. Thus the federal anti-lien statute is not violated when the State seeks reimbursement in an interpleader action. As stated in the State's brief:

> Placing a lien against [**6] third party settlement proceeds does not result in a "lien against the property of an individual prior to his death on account of medical assistance paid or to be paid on his behalf" because third party settlement proceeds have been specified by the recipient as belonging to the State Medicaid Agency as a precondition of the recipient's eligibility.

McNeil next contends that both federal and state statutes explicitly allow a personal injury victim to put proceeds from a personal injury settlement into a special needs trust and thereby avoid any claim by the State for Medicaid reimbursement. This same issue was raised in *S.S. v. State, 1998 Utah LEXIS 87.* There we held that repayment of the Medicaid lien from third-party settlement funds must precede the creation of the supplemental needs trust. That holding is controlling here; once the trust is created, the State cannot make any demand upon it during McNeil's lifetime.

Lastly, McNeil contends that the State-imposed lien against his personal injury settlement proceeds constitutes a

taking of his property without due process of law in violation of both the United States and Utah Constitutions. He argues that he has a property interest in his [**7] right to recover for personal injuries, and the State may not lien or take this property without affording him procedural due process or, in other words, a notice and a hearing. We again find no merit in this contention. As a condition to receiving Medicaid assistance, McNeil's legal guardian assigned to the State that portion of any third-party recovery equal to the amount of Medicaid assistance which may be rendered him. Even if we were to assume that McNeil does have a limited property interest in the funds which were assigned, his constitutional rights were not violated by the [*449] State. He was afforded the opportunity to be heard in the district court concerning the award of part of the settlement proceeds to the State. He has now been afforded an appeal to this court. In both courts, his arguments have been asserted and both courts have ruled against him. He has been accorded full due process even though his contentions have been rejected by both courts.

Judgment affirmed.

Justice Zimmerman and Justice Russon concur in Chief Justice Howe's opinion.

DISSENT BY: DURHAM

DISSENT:
DURHAM, Associate Chief Justice, dissenting:

I respectfully dissent in this case as [**8] well as in today's companion case, *S.S. v. State, 1998 Utah LEXIS 87.*

McNeil, the appellant in this case, asserts that state statutes allowing the State to file liens against a Medicaid recipient for money received from third parties in personal injury suits directly contradict provisions of federal Medicaid law. Therefore, McNeil argues, the federal statutes preempt the state statutes, making the lien against McNeil invalid and requiring summary judgment in McNeil's favor. The majority holds that no such contradiction exists and that no cause for preemption has been raised. I disagree. I would hold that our state statutes do contradict provisions of federal Medicaid law and that federal law controls.

The Utah Code chapter on Medicaid specifically prevents application of any part of the chapter in a manner contrary to federal law. See Utah Code Ann. § 26-19-17. The Utah Code does provide for the State to recover, through a lien on recipients' property, any payments from liable third parties made to Medicaid recipients. Utah Code Ann. §§ 26-19-5(1) & -7(1)(b). The federal law, however, states clearly that "no lien may be imposed against the property of any individual prior to his death on account [**9] of medical assistance paid or to be paid on his behalf under the State plan, except" when the benefits were incorrectly paid or the property is the real property of specified individuals. *42 U.S.C. § 1396p*(a)(1). Furthermore, "no adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made, except" in the situations described above or when the recipient is over 65 and meets certain requirements. *42 U.S.C. § 1396p*(b)(1). Both parties agree that the exceptions in these sections do not apply to McNeil and that the State has in fact acquired a lien. Thus, the federal statute conflicts with the state statute and prohibits the State's actions in this case.

The majority, absent any analysis or justification, holds that "by viewing that part of the insurance proceeds which have been assigned by McNeil's guardian to the State as not the property of McNeil" it may allow the State to reach what is in actuality McNeil's property. Federal law expressly prohibits liens being imposed against the property of individuals in McNeil's situation. See *42 U.S.C. § 1396p*(a). The majority achieves an "end run" around this prohibition through [**10] what seems to me the illogical conclusion that the proceeds in dispute are not really McNeil's property, but perhaps his grandmother's or even the State's. The language of section 1396p clearly states "no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid." *42 U.S.C. § 1396p*(a) (emphasis added). Because the statute expressly applies to any property, the majority's result arbitrarily deprives McNeil of his property. See generally *State v. Murtha, 179 Conn. 463, 427 A.2d 807, 810 (Conn. 1980)* (holding that "the design of the statute is to prohibit . . . efforts by states to recoup from beneficiaries . . . amounts paid for medical assistance to those beneficiaries during their lifetimes").

As indicated above, all Medicaid recipients must, as a condition of eligibility,

> assign the State any rights, of the individual or of any other person who is eligible for medial assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, . . . to payment for medical care from any third party.

42 U.S.C. § 1396k(a)(1)(A).

McNeil's grandmother [**11] did assign McNeil's right to third-party payments to Medicaid, [*450] but the assignment was not exclusive, as evidenced by Medicaid's willingness to allow recipients to pursue third-party recovery actions independently, provided they notify Medicaid first. In other words, McNeil still retained the right to sue for and receive third-party payments, notwithstanding the State's collateral interest in recovering Medicaid benefits. See Utah Code Ann. § 26-19-7. Moreover, McNeil's injuries in this case--including pain and suffering and lost wages--exceeded the amount Medicaid paid on his behalf for medical care alone. Had Medicaid decided not to sue because the costs of recovery would exceed the recovery itself, see Utah Code Ann. § 26-19-5(4), McNeil could, nevertheless, have pursued the third party for his damages. Thus, both the State and McNeil had causes of action against Allstate. The State did not pursue its claim, however. The settlement made by all liable parties gave McNeil $85,000, and the State cross-claimed only against McNeil for reimbursement. The procedural posture of this case thus illustrates clearly that the State seeks to enforce its lien against McNeil and his property--the [**12] settlement amount. The majority's holding that the lien is against its "own property" is unrealistic. The State sought recovery from McNeil directly, possibly to save itself the expense of litigation with Allstate. n1 Although protecting public money is an admirable goal, the State should not be allowed to pursue it at the expense of persons Congress sought to protect in creating prohibition against liens of this kind.

n1 The recipient must pay all of the State's litigation expenses incurred from fighting with the recipient if the agency wins. Utah Code Ann. § 26-19-7(2). The State must bear its own expenses when litigating with a third party.

> The State argued (and the majority apparently agrees) that the above interpretation makes the third-party liability recovery portions of the statute "meaningless," and urges us to read the statute to allow liens against personal injury recoveries. The underlying assignment relied on by the State, viewed in isolation, gives Medicaid the right to make a claim either against [**13] third parties for such money or against the recipient once he receives the money. However, "a statute should not be construed in a piecemeal fashion but as a comprehensive whole." *Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991).* Therefore, because another section of the Medicaid statute prohibits not only liens against Medicaid recipients but also any recovery for medical assistance correctly paid, see *42 U.S.C. § 1396p,* the proper conclusion is that the State can enforce the assignment only by instituting claims directly against the liable third parties.

Other parts of the federal statute make the intent of Congress clear. The federal government requires states to

> (A) . . . take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan, including--
>
> (I) the collection of sufficient information . . . to enable the State to pursue claims against such third parties,
>
> . . .
>
> (B) . . . in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual . . . the State . . . will [**14] seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C. § 1396a(a)(25) (emphasis added).

It is true, as the State argues, that these statutes reflect the legislative intent that Medicaid should recover its health care expenditures where third parties caused a Medicaid recipient to incur them. However, the language of various sections of the statute indicates that Congress anticipated that third-party recovery would come directly from the third parties and not from the recipient. The language in section 1396a(25) states plainly that states should pursue their third-party liability claims against the third parties themselves. See *42 U.S.C. § 1396a*(25). It does not mention recovery from the Medicaid recipient. The Utah statute, on the other hand, allows the department "to recover medical assistance provided as a result of the injury, disease, or disability" directly from the Medicaid recipient through a lien. Utah Code Ann. § 26-19-5(1) & -7(2). Congress plainly did not intend to authorize this method of collection.

[*451] Congress's understanding of a Medicaid recipient's plight could rationally have led it to require Medicaid agencies [**15] to proceed against the third party and not against the recipient. People receive Medicaid assistance when they have no other resources to pay for medical care. Requiring such persons to defend against liens is inconsistent with the entire benefit system created by the federal statutes. Congress had good reason to prohibit liens against recipients and to require the agencies to go after the liable third parties directly, thereby possibly reducing the injured party's burden. n2

n2 When an agency collects more than it has expended on an individual, it must reimburse that individual for the remainder. *42 U.S.C. § 1396k*(b).

> Moreover, the Department of Health and Human Services has made all state Medicaid directors aware that liens are only appropriate against the third party's property prior to an award to the injured party and are forbidden against a recipient's property.

Section 1917(a) [*42 U.S.C. § 1396p*(a)] precludes states from placing liens on an individual's property. However, because a potential [**16] personal injury settlement is not yet the plaintiff's property, it can be subject to a TPL [Third Party Liability] lien. . . . To avoid the lien issue, but protect its rights, a state could . . . intervene in the case and represent its own interests directly. Since the individual has assigned to the state his or her rights to recover payment for medical care under section 1912, the state has an interest which it can represent directly.[n3]

n3 This memorandum also suggests that if the court places proceeds in a trust, the proceeds belong to the trust and not the individual, and thus a state can lien the trust. Id. However, the memorandum goes on to say that such liens will not work against special needs trusts, such as the one created for McNeil by the district court. Id. at 3-5; *42 U.S.C. § 1396p*(d)(4). Thus the State may not exercise this option in this case.

Memorandum from Sally K. Richardson, Director of the Medicaid Bureau to all state medicaid directors (June 5, 1996), at 3 (emphasis [**17] added). A lien on a "potential personal injury settlement" most logically means on the insurance proceeds themselves, or on the assets of the third party. n4 The Richardson memo does not contain the option of placing a lien on the recipient's recovery after the recipient has proven liability and thus established a legal claim to the specific fund,

as the State did in this case. The State chose to wait until legal ownership of the property transferred to McNeil before attempting to enforce its claim. That the money is not in McNeil's physical possession does not matter; it is McNeil's money. The State should not be permitted to proceed in this manner given the federal statute's prohibition on liens against recipients' property.

n4 The New York Court of Appeals has read this phrase to include the type of lien placed in this case, but that reading is forced in light of the statutes. See *Cricchio v. Pennisi, 90 N.Y.2d 296, 683 N.E.2d 301, 660 N.Y.S.2d 679 (N.Y. 1997).*

> The Medicaid statute further confirms [**18] this interpretation in part C of the assignment section, which mandates recipients to "cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable." *42 U.S.C. § 1396k*(a)(1)(C) (emphasis added). Although this part specifically addresses the duties of a Medicaid recipient, the underlined language indicates that Congress expected the states to sue the third parties directly rather than waiting for the recipient to collect and then suing him.

Furthermore, the State's own Medicaid manual requires that States "seek recovery from the third party whenever a claim or claims have been paid for which a third party is liable. (See § 3904.3)." State Medicaid Manual, HCFA Pub. 45-3, § 3902, Transmittal No. 53 (May 1991) (emphasis added). Similarly, another provision states that "an agency must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to recover

will be greater than the costs of recovery." 42 C.F.R § 433.140(f)(1). The State has failed to do so in this case.

The State relies on certain letters from the director of the Medicaid [**19] Bureau recognizing the tension in the statutes and responding with the conclusion that opening the assignment of payments makes any of the recipient's [*452] proceeds from a personal injury case actually the property of Medicaid. See Letter from Sally K. Richardson, Director Medicaid Bureau, to Sonia Crannage, Sinnreich & Crannage Attorneys at Law (December 20, 1993); Letter from Sally K. Richardson, Director Medicaid Bureau, to Howard K. Gibbs, Assistant General Counsel, Human Resources Administration (December 20, 1993). These communications were apparently drafted without the benefit of any public hearing, and they do not represent an official agency determination on the matter. Therefore, we should not afford them any particular deference. Furthermore, even if they represented official positions, a proper reading of the federal statutes would require us to reject their rationale. See, e.g., *Williams v. Mountain States Tel. & Tel. Co., 763 P.2d 796, 799 (Utah 1988)* (reversing agency decision that directly contradicts statutory language).

Another aspect of the statutory scheme that supports this reading of the statute is the incentive the federal government gives to the states [**20] when they successfully collect third-party liability money: for any successful collection, the federal government returns fifteen percent of the money recovered on its behalf to the collecting agency as an "incentive payment[] for enforcement and collection." *42 U.S.C. § 1396b*(p). This incentive scheme implicitly assumes that the state will incur costs in recovering third-party payments and that the incentives will help to offset such costs. When the State places a lien on money already received by Medicaid recipients, it basically

seeks a "free ride"; the recipient bears all of the investigation and litigation costs, and the State has to pay only for the lien. Additionally, if the recipient challenges the lien and loses, the recipient must also pay the State's attorney fees and costs under Utah law. Allowing the State to operate in this manner, and then collect attorney fees and the federal incentive fee, results in a windfall for the State from the pockets of injured and needy parties. Congress could hardly have intended such a result, especially in light of language elsewhere in the statute.

The State bases its cross-claim against McNeil on Utah Code Ann. §§ 26-19-5(1) & -7(2). [**21] Because these sections directly contradict federal law, *42 U.S.C. § 1396p*(a), the State's liens should be declared illegal under Utah Code Ann. § 26-19-17. Therefore, I would reverse the district court's grant of summary judgment in favor of the State and grant summary judgment to McNeil. The State's lien is unenforceable. n5

n5 The briefs also raised the important issue of whether the State has a priority lien against the third party and thus recovers 100% of its expenses before anyone else collects anything, or whether it can recover an amount proportional to the expenses of the other claimants. We obviously do not reach this issue in this case.

Justice Stewart concurs in Associate Chief Justice Durham's dissenting opinion.

[APPENDIX B]

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

State of Utah, Medicaid Section
Plaintiff and appellee, No. 960028

v.

Daniel N. McNeil
Defendant and appellant.

---oo0oo---

ORDER

This matter is before the Court on Appellants' petition for rehearing filed December 16, 1998.

The petition for rehearing is denied.

For The Court:

Jan. 29, 1999
Date

s/ Richard C. Howe
Richard C. Howe
Chief Justice

[APPENDIX C]

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CACHE
STATE OF UTAH

DAVID SPENCER WALLACE and ALLSTATE INSURANCE COMPANY,	)	
Plaintiffs,	)	MEMORANDUM DECISION
vs.	)	
ESTATE OF NICOLE JACKSON, DANIEL MCNEIL, EMILY NELSON, KEEJOE ATTAKAI, STATE OF UTAH MEDICAID SECTION and JOHN DOES I - XX,	)	Civil No. 950000014 PI
Defendants.	)	

Appendix C

STATE OF UTAH, MEDICAID SECTION,	)	
Crossclaimant and Counter-claim Defendant,	)	
vs.	)	HONORABLE BEN H. HADFIELD
DANIEL M. McNEIL,	)	
Crossclaim Defendant and Counterclaimant.	)	

This matter comes before the Court pursuant to the Motions for Summary Judgment filed by both State of Utah Medicaid Section and Daniel M. McNeil. The Court has received and reviewed the motions, accompanying memoranda, as well as supporting documents and authorities. Oral Argument was held September 7, 1995.

Daniel M. McNeil has been raised by his grandmother. For a number of years prior to the accident, Daniel and his grandmother received Medicaid assistance. Pursuant to standard requirements of the Medicaid program, the grandmother has routinely signed an Assignment whereby any right to reimbursement for medical expenses advanced by Medicaid is assigned to the State of Utah Medicaid section. As a result of the accident, which is the underlying basis for this litigation, Daniel McNeil sustained serious head injuries and incurred approximately $100,000.00 in medical bills. The State of Utah Medicaid section negotiated with the health care providers and achieved a full satisfaction and release of these bills in exchange for payment totaling approximately $43,000.00.

McNeil, through his attorneys, has now obtained offers of settlement which total approximately $85,000.00. The State of Utah Medicaid section claims that it is entitled to be wholly reimbursed from these funds as a result of the Assignments executed by McNeil's grandmother and guardian.

For the reasons set forth in the State's memoranda, the State of Utah Medicaid section's Motion For Summary Judgment is granted and Daniel M. McNeil's Motion For Summary Judgment is denied. The Court specifically interprets the Federal Statutes and Regulations, as well as State Statutes as authorizing the State to receive complete reimbursement under the circumstances of this case. A ruling in favor of McNeil, as requested, would force the State, in future cases, to withhold payment of any Medicaid benefits until all personal injury claims were completely adjudicated. The circumstances of this case demonstrate the futility of such an approach. If the State had withheld making payments pending the outcome of the litigation, Mr. McNeil would now be sitting with approximately $85,000.00 in tendered settlement funds and approximately $100,000.00 in medical bills. Such a result certainly would have no advantage for McNeil.

Pursuant to U.C.A. 26-19-16, the State is entitled to recover reasonable attorneys fees and costs incurred in this litigation. The State is directed to submit an Affidavit of costs and fees, and Mr. McNeil will be allowed fourteen (14) days with which to respond. Counsel for the State of Utah is directed to prepare a Judgment and Order in conformance herewith.

DATED this 15 day of September, 1995.

BY THE COURT:

s/ Ben H. Hadfield
Ben H. Hadfield
District Judge

Appendix C

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Assistant Attorney General
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IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CACHE
STATE OF UTAH

DAVID SPENCER WALLACE and ALLSTATE INSURANCE COMPANY,	ORDER OF ATTORNEYS FEES
Plaintiffs,	
vs.	Civil No. 950000014 PI
ESTATE OF NICOLE JACKSON, DANIEL MCNEIL, EMILY NELSON, KEEJOE ATTAKAI, STATE OF UTAH MEDICAID SECTION and JOHN DOES I - XX,	JUDGE: BEN HADFIELD
Defendants.	

Appendix C

STATE OF UTAH, MEDICAID SECTION,	)
Crossclaimant and Counter-claim Defendant,	)
vs.	)
DANIEL M. McNEIL,	)
Crossclaim Defendant and Counterclaimant.	)

PURSUANT to Rule 4-505, Utah Rules of Judicial Administration and based upon the Affidavit of Attorneys Fees submitted by Amy A. Jackson, Assistant Attorney General, counsel for Crossclaimant and Counterclaim Defendant, reflecting a total of 50 hours at a rate of $75.00 per hour for a sum total of $3,750.00;

IT IS HEREBY ORDERED:

Daniel M. McNeil, Crossclaim Defendant and Counterclaimant pay to State of Utah, Office of Recovery Services, Crossclaimant and Counterclaim Defendant, the amount of $3,750.00 for attorneys fees in this matter.

DATED this 4 day of December, 1995.

BY THE COURT:

s/ Ben H. Hadfield
JUDGE

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IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

DAVID SPENCER WALLACE and ALLSTATE INSURANCE COMPANY, Plaintiffs, vs. ESTATE OF NICOLE JACKSON, DANIEL MCNEIL, EMILY NELSON, KEEJOE ATTAKĀI, STATE OF UTAH MEDICAID SECTION and JOHN DOES I - XX, Defendants.	AMENDED ORDER OF ACCRUED INTEREST Civil No. 950000014 PI JUDGE: BEN HADFIELD

STATE OF UTAH, MEDICAID SECTION,	)
Crossclaimant and Counter-claim Defendant,	)
vs.	)
DANIEL M. McNEIL,	)
Crossclaim Defendant and Counterclaimant.	)

PURSUANT to the provisions of Utah Code § 26-19-16:

> In any action brought by the department under this chapter in which it prevails, the department ***shall*** recover along with the principal sum ***and interest***, a reasonable attorney's fee and costs incurred. (emphasis added)

According to Utah Code § 62A-9-132, interest shall accrue at the rate of 8% per annum.

Therefore, the State of Utah shall be awarded 8% interest on the monies paid out in McNeil's behalf as follows:

a. On the lien dated December 27, 1994 for $19,863.75 at 8% from February 25, 1995 (60 day grace period) to September 30, 1995 or 222 days equaling ..... $969.35.

b. On the lien dated March 24, 1995 for $22,727.81, an additional amount of $2,864.06 at 8% from May 23, 1995 (60 day grace period) to September 30, 1995 or 130 days equaling . . . . . $ 82.48.

c. On the lien dated June 9, 1995 for $41,974.66, an additional amount of $19,246.85 at 8% from August 8, 1995 (60 day grace period) to September 30, 1995 or 53 days equaling . . . . . $230.96.
$1,282.79

The sum total of the accrued interest on these three liens equal $1,282.79

THEREFORE, IT IS HEREBY ORDERED:

Daniel M. McNeil, Crossclaim Defendant and Counterclaimant immediately pay to State of Utah, Office of Recovery Services, Crossclaimant and Counterclaim Defendant, the amount of $1,282.79.

DATED this 24 day of January, 1996.

BY THE COURT:

s/ Ben H. Hadfield
JUDGE

[APPENDIX D]

42 USCS § 1396p(a) and (b) (1998):

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against the property of an individual on account of medical assistance rendered to him under a State plan.

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except--

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual--

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if--

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [*42 USCS §§ 1381* et seq.]) is blind or permanently and totally disabled, or (with respect to States

which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [*42 USCS § 1382c*], or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan.

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B), the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of--

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C) (i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources--

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time--

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [*42 USCS §§ 1381* et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [*42 USCS § 1382c];* and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when--

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual--

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

[APPENDIX E]

Utah Code Ann. § 26-19-5 (1989):

(1) When the department provides or becomes obligated to provide medical assistance to a recipient because of an injury, disease, or disability for which a third party is liable, the department may recover the medical assistance directly from that third party. The department's claim to recover medical assistance provided as a result of such an injury, disease, or disability is a lien against any proceeds payable to the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs authorized under Subsection 26-19-7(4).

(2) The department shall mail or deliver written notice of its lien to the third party at its principal place of business or last known address. The notice shall include the recipient's name, the approximate date of injury, a general description of the type of injury and, if applicable, the general location where the injury is alleged to have occurred.

(3) The department may commence an action on its lien in its own name however, that lien is not enforceable as to a third party unless:

(a) the third party receives written notice of the department's lien before it settles with the recipient; or

(b) the department has evidence that the third party had knowledge that the department provided or was obligated to provide medical assistance.

(4) The department may waive a claim against a third party in whole or in part, or may compromise, settle, or release a claim or lien.

(5) An action commenced under this section does not bar an action by a recipient or a dependent of a recipient for loss or damage not included in the department's action.

[APPENDIX F]

Utah Code Ann. § 26-19-7 (1989):

(1)(a) A recipient may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance without the department's written consent.

(b) The department has an unconditional right to intervene in an action commenced by a recipient for recovery of medical costs connected with the same injury, disease, or disability, for which it has provided or has become obligated to provide medical assistance.

(2) If the recipient proceeds without the department's written consent as required by Subsection (1)(a), the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action. The department may recover in full from the recipient all medical assistance which it has provided and retains its right to commence an independent action against the third party, subject to Subsection 26-19-5(3).

(3) The department's written consent, if given, shall state under what terms the interests of the department may be represented in an action commenced by the recipient.

(4) The department may not pay more than 33% of its total recovery for attorney's fees, but shall pay a proportionate share of the costs in an action that is commenced with the department's written consent.

[APPENDIX G]

42 U.S.C. 1396(a)(25):

(25) provide--

(A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1167(1)]), service benefit plans, and health maintenance organizations) to pay for care and services available under the plan, including--

(i) the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims against such third parties, with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and

(ii) the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties, which plan shall be integrated with, and be monitored as a part of the Secretary's review of, the State's mechanized claims processing and information retrieval systems required under section 1903(r) [42 USCS § 1396b(r)];

(B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability;

(C) that in the case of an individual who is entitled to medical assistance under the State plan with respect to a service for which a third party is liable for payment, the person furnishing the service may not seek to collect from the individual (or any financially responsible relative or representative of that individual) payment of an amount for that

service (i) if the total of the amount of the liabilities of third parties for that service is at least equal to the amount payable for that service under the plan (disregarding section 1916 [42 USCS § 1396o]), or (ii) in an amount which exceeds the lesser of (I) the amount which may be collected under section 1916 [42 USCS § 1396o], or (II) the amount by which the amount payable for that service under the plan (disregarding section 1916 [42 USCS §1396o]) exceeds the total of the amount of the liabilities of third parties for that service;

(D) that a person who furnishes services and is participating under the plan may not refuse to furnish services to an individual (who is entitled to have payment made under the plan for the services the person furnishes) because of a third party's potential liability for payment for the service;

(E) that in the case of prenatal or preventive pediatric care (including early and periodic screening and diagnosis services under section 1905(a)(4)(B) [42 USCS § 1396d(a)(4)(B)]) covered under the State plan, the State shall--

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to the liability of a third party for payment for such services; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(F) that in the case of any services covered under such plan which are provided to an individual on whose behalf child support enforcement is being carried out by the State agency under part D of title IV of this Act [42 USCS §§ 651 et seq.], the State shall--

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to any third-party liability for payment for such services, if such third-party liability is derived (through insurance or otherwise) from the parent whose obligation to pay

support is being enforced by such agency, if payment has not been made by such third party within 30 days after such services are furnished; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(G) that the State prohibits any health insurer (including a group health plan, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1167(1)], a service benefit plan, and a health maintenance organization), in enrolling an individual or in making any payments for benefits to the individual or on the individual's behalf, from taking into account that the individual is eligible for or is provided medical assistance under a plan under this title [42 USCS §§ 1396 et seq.] for such State, or any other State; and

(H) that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services;

(I) [Redesignated]

[APPENDIX H]

42 USCS § 1396p(d) (1998):

(d) Treatment of trust amounts.

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title [*42 USCS §§ 1396* et seq.], subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2) (A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to--

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3) (A) In the case of a revocable trust--

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).

(B) In the case of an irrevocable trust--

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income--

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3) [*42 USCS § 1382c*(a)(3)]) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [*42 USCS §§ 1396* et seq.].

(B) A trust established in a State for the benefit of an individual if--

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [*42 USCS §§ 1396* et seq.], and

(iii) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V) [*42 USCS § 1396a*(a)(10)(A)(ii)(V)], but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C) [*42 USCS § 1396a*(a)(10)(C)].

(C) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) [*42 USCS § 1382c*(a)(3)] that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in

section 1614(a)(3)) [*42 USCS § 1382c*(a)(3)] by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [*42 USCS §§ 1396* et seq.].

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

[APPENDIX I]

Utah Code Ann. § 62A-5-110 (1994):

(1) For purposes of this section:

(a) " Discretionary trust for a person with disabilities" means a trust:

(i) that is established for the benefit of an individual who, at the time the trust is created, has a disability as defined in 42 U.S.C. Sec. 1382c;

(ii) under which the trustee has discretionary power to determine distributions;

(iii) under which the beneficiary may not control or demand payments unless an abuse of the trustee's duties or discretion is shown;

(iv) that is not created by the beneficiary, the beneficiary's spouse, or by an individual acting on behalf of the beneficiary utilizing the beneficiary's assets;

(v) that is irrevocable, except that the trust document may provide that the trust be terminated if the beneficiary no longer has a disability as defined in 42 U.S.C. Sec. 1382c; and

(vi) providing that, upon the death of the beneficiary, the state will receive all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the beneficiary.

(b) "Medical assistance" means the same as that term is defined in Section 26-18-2.

(2) A state agency providing services or support to a person with disabilities may:

(a) waive application of Subsection (1)(a)(v) with respect to that individual if it determines that application of the criteria would place an undue hardship upon that individual; and

(b) define, by rule, what constitutes "undue hardship" for purposes of this section.

(3) A discretionary trust for a person with disabilities is not liable for reimbursement or payment to the state or any state agency, for financial aid or services provided to that individual except:

(a) to the extent that the trust property has been distributed directly to or is otherwise under the control of the disabled beneficiary; or

(b) as provided in Subsection (1)(a)(vi).

(4) Property, goods, and services that are purchased or owned by a discretionary trust for a person with disabilities and that are used or consumed by a disabled beneficiary shall not be considered trust property that is distributed to or under the control of the beneficiary.

(5) The benefits that a person with disabilities is otherwise legally entitled to may not be reduced, impaired, or diminished in any way because of contribution to a discretionary trust for that person, utilization of trust income to provide benefits to a disabled beneficiary.

(6) All state agencies shall disregard a discretionary trust for a person with disabilities, as defined in Subsection (1), as a resource when determining eligibility for services or support except as, and only to the extent that it is otherwise prohibited by federal law.

(7) This section applies to all discretionary trusts that meet the requirements contained in Subsection (1) created before, on, or after July 1, 1994.

[APPENDIX J]

42 USCS § 1396k:

§ 1396k. Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this title [*42 USCS §§ 1396* et seq.], a State plan for medical assistance shall--

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required--

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this title [*42 USCS §§ 1396* et seq.] and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1902(l)(1)(A) [*42 USCS § 1396a*(l)(1)(A)] or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 454(3) [*42 USCS § 654*(3)]) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

[APPENDIX K]

STATE OF UTAH
DEPARTMENT OF HUMAN SERVICES
OFFICE OF RECOVERY SERVICES
MEDICAID SECTION
515 East 100 South
P.O. Box 45025
Salt Lake City, Utah 84145-5025
(801) 536-8808
(801) 538-3959 (For The Hearing Impaired)

August 8, 1995

Sykes & Vilos
Attn: Robert B. McNeil
311 South State St. Suite 240
Salt Lake City, UT 84111

NOTICE OF LIEN
[UPDATED LIEN]

You are hereby notified that the Department of Health, State of Utah, has paid medical expenses on behalf of the individual named below. You have been identified as the Attorney representing the Medicaid recipient.

Pursuant to Utah Code Ann. Section 296-19-5, the State of Utah has a lien against any money payable to the Medicaid recipient relating to the incident outlined below. You should make no payment to the Medicaid recipient prior to contacting the investigator listed below:

NAME OF MEDICAID RECIPIENT: Daniel M. McNeil

DATE OF INJURY: October 7, 1994

DESCRIPTION OF INJURY: Auto Accident

Appendix K

LOCATION OF INJURY: Cache County

ESTIMATED EXPENSES: $43,519.35

IF YOU HAVE ANY QUESTIONS OR WISH TO MAKE ARRANGEMENTS TO RESOLVE THIS MATTER, PLEASE CALL THE INVESTIGATOR LISTED BELOW.

s/ Rod Gilliand
Signature

Rod Gilliand
Investigator, Utah State
Office of Recovery Services
515 East 100 South
P.O. Box 45025
Salt Lake City, UT 84145
Telephone: 536-8807
Toll Free: In-State 1-800-821-2237
Toll Free: Out-State 1-800-257-9156

[APPENDIX L]

ROBERT C. MORTON - #6284
Assistant Attorney General
JAN GRAHAM - #1231
ATTORNEY GENERAL
120 North 200 West, 4th Floor
P.O. Box 1980
Salt Lake City, Utah 84110-1980
Telephone: (801) 538-4660

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR CACHE COUNTY, STATE OF UTAH

DAVID SPENCER WALLACE, and ALLSTATE INSURANCE COMPANY,	)	DEFENDANT STATE OF UTAH'S ANSWER TO PLAINTIFF'S COMPLAINT AND CROSS-CLAIM AGAINST DANIEL MCNEIL
Plaintiffs,	)	
vs.	)	
ESTATE OF NICHOLE JACKSON, DANIEL MCNEIL, EMILY NELSON, KEEJOE ATTAKAI, STATE OF UTAH, MEDICAID SECTION and JOHN DOES I-XX,	)	Civil No:
	)	Judge:
Defendants.	)	

Appendix L

Answer and Cross-Claim

Comes now the State of Utah, Office of Recovery Services-Medicaid, by and through their Attorney, Robert C. Morton, Assistant Attorney General, State of Utah, and for their answer to Plaintiff's Complaint, and their Cross-claim against Defendant Daniel McNeil, do admit, deny and state as follows:

1) Defendant admits those allegations in Paragraphs 1 and 2 on page one (1) of the complaint entitled Jurisdiction and Venue.

2) Defendant admits those allegations in Paragraphs 1 and 3 on page two (2) of said complaint.

3) In answering Paragraph 2 on page two (2) of said complaint, the defendant admits those allegations, except that "David Spencer Wallace has no other asset" to which Defendant has insufficient knowledge to either admit or deny this allegation, and therefore denies the same.

4) In answering Paragraph 4 of said complaint, defendant admits that Nicole Jackson was fatally injured in the accident, but has insufficient knowledge to either admit or deny the remaining allegations in said paragraph and therefore deny the same.

5) In answering Paragraph 5 of said complaint, defendant admits those allegations, but would state that the amount of medical damages paid by Medicaid is approximately $19,863.75.

6) In answering Paragraph 6, 7 and 9 of said complaint, the defendant has insufficient knowledge to either admit or deny the allegations, and therefore denies the same.

7) In answering Paragraph 8 of said complaint, defendant admits those allegations, but would state that the amount of medical damages paid by Medicaid is approximately $19,863.75.

STATE OF UTAH V. DANIEL McNEIL
CROSS-CLAIM

Comes now the State of Utah, Office of Recovery Services-Medicaid, by and through their Attorney, Robert C. Morton, Assistant Attorney General, State of Utah, and for their Cross-claim against Daniel McNeil do state as follows:

1) The State of Utah, through the Department of Health, has provided medical assistance to the Defendant Daniel McNeil in the approximate sum of $19,863.75, for which the plaintiff David Spencer Wallace is liable, and for which the Plaintiff Allstate is liable to the extent said claims are covered by the insurance policy referred to in Paragraph 2 (Page 2) of Plaintiff's complaint.

2) The State of Utah, through the Office of Recovery Services-Medicaid, has a lien against any of the proceeds payable to Daniel McNeil by the Plaintiffs herein.

3) The lien referred to in Paragraph 2 of this Cross-Claim has priority over all other claims to the proceeds payable to Daniel McNeil by the Plaintiffs.

4) That the State of Utah, Office of Recovery Services-Medicaid, is entitled to recover the principal sum of their lien, together with interest, attorney fees and costs from the proceeds payable to Daniel McNeil by the Plaintiffs.

WHEREFORE, the Defendant, State of Utah, Offices of Recovery Services-Medicaid pray:

1) That the defendants be required to interplead concerning their claims to said sum of money now in the hands of plaintiff.

2) That the State of Utah, Office of Recovery Services-Medicaid, recover the principal sum of their lien, together with interest, attorney fees and costs from the proceeds payable to Daniel McNeil by the Plaintiffs.

3) For such other and further relief as the court may deem just and proper in the this action.

Dated this 13 day of March, 1995.

s/ Robert C. Morton
ROBERT C. MORTON
Assistant Attorney General

[APPENDIX M]

S.S., a minor, Plaintiff and Appellee, v. State of Utah and Office of Recovery Services, Defendant and Appellant.

No. 960430

SUPREME COURT OF UTAH

972 P.2d 439; 1998 Utah LEXIS 87; 357 Utah Adv. Rep. 15

November 27, 1998, Filed

SUBSEQUENT HISTORY: [**1]

Released for Publication February 11, 1999.

PRIOR HISTORY: Third District, Salt Lake Div. I. The Honorable Leslie A. Lewis.

DISPOSITION: Reversed the judgment of the trial court and remanded for further proceedings consistent with this opinion.

CORE TERMS: supplemental, reimbursement, third party, recipient, medical assistance, settlement, conservators, eligibility, third-party, disabled, beneficiary, disability, settle, discretionary trust, exemption, lifetime, notice, irreconcilable conflict, obligated to provide, contributed, long-term, repayment, reimburse, assigned, nursing home care, third parties, attachment, collection, mandatory, commence

COUNSEL: Lowell V. Smith, Richard K. Glauser, Salt Lake City, for plaintiff.

Jan Graham, Att'y Gen., Linda Luinstra, Asst. Att'y Gen., Salt Lake City, for defendant.

JUDGES: HOWE, Chief Justice. Justice Zimmerman and Justice Russon concur in Chief Justice Howe's opinion. DURHAM, Justice, dissenting. Justice Stewart concurs in Associate Chief Justice Durham's dissenting opinion.

OPINION BY: HOWE

OPINION:
[*440] HOWE, Chief Justice:

The State of Utah appeals from the trial court's order that insurance payments for the injury which permanently disabled the minor plaintiff may be used to fund a "special needs trust" to be established to augment his long-term care without first reimbursing the State for Medicaid payment of plaintiff's nursing home care.

FACTS

Sixteen-year-old S.S. suffered massive brain damage and was permanently disabled when a drunk driver crossed into oncoming traffic and struck the motorcycle upon which he and [**2] his eighteen-year-old brother were riding. S.S.'s parents are divorced; he was residing in Utah with his father, Richard S., at the time of the accident, although his mother had been awarded his custody.

A combination of private automobile, accident, and injury insurance plans contributed toward payment of S.S.'s medical costs, which totaled over $350,000. In addition, S.S.'s stepfather maintained a health insurance policy with Deseret

Mutual Benefit Association ("DMBA"), which paid a substantial amount of medical expenses but provided no coverage for nursing home care.

S.S. was transferred from hospital care to nursing home care when his condition improved. Richard S. applied for and received Medicaid on S.S.'s behalf and, pursuant to statute, executed an assignment of S.S.'s rights to any insurance recovery to the State. S.S.'s three older brothers, Douglas, Robert, and Michael S., were appointed conservators of his estate and petitioned the trial court for authorization to settle several insurance claims and to place the funds recovered in a special needs trust for S.S. The court approved settlement of $150,000 in insurance proceeds on February 29, 1996, and approved an [**3] additional $25,000 on August 26 of that year. The State asserted its statutory lien on part of the proceeds. The trial court held that (1) the State did not have a valid assignment because it had not been executed by the court-appointed conservators or by a legal guardian, (2) the State had not perfected its lien on the insurance proceeds, and (3) the insurance proceeds could be placed in the special needs trust without first reimbursing the State for nursing home costs paid by Medicaid which totaled $44,454.58. The court's decision was influenced by the absence of a requirement for pre-trust reimbursement in the "supplemental needs trust" ("SNT") n1 provisions of the United States Code, the Federal Regulations, and the Utah Code. The State appeals, assigning as error all three of the above trial court rulings.

n1 Also referred to as a "special needs trust."

ANALYSIS

This case presents only questions of law, which we review for correctness, granting [*441] no deference to the conclusions of the trial court. [**4] *State v. Pena, 869 P.2d 932, 936 (Utah 1994).*

I. ASSIGNMENT OF BENEFITS

The conservators contended in the trial court, and the court agreed, that the assignment of third-party payments made by Richard S. to Medicaid as a condition for receiving benefits was invalid because it was not made by S.S.'s mother, who had been awarded his custody, or by his court-appointed conservators. We begin with the plain wording of the relevant statutes.

To the extent that medical assistance is actually provided to a recipient, all benefits for medical services or payments from a third party otherwise payable to or on behalf of a recipient are deemed to be assigned to the department if the department provides, or becomes obligated to provide, medical assistance. That assignment authorizes the department to submit its claim to the third party and authorizes payment of benefits directly to the department.

Utah Code Ann. § 26-19-4.5(1) (emphasis added). This statutory language would seem to indicate that without more, a recipient's acceptance of Medicaid payments operates to create an assignment. Additionally, however, in this case an assignment was made by the injured minor's [**5] father who is legally responsible for his son's medical expenses. Utah Code Ann. § 78-45-3(2)(a) provides that "except as limited in a court order . . . the expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and

other necessities are chargeable upon the property of both parents, regardless of the marital status of the parents." Thus there was a valid assignment of the insurance recovery.

II. PERFECTION OF LIEN

Conservators further complained in the trial court that the State had not perfected its lien on the insurance proceeds because it had not submitted evidence of compliance with Utah Code Ann. § 26-19-5. Under that section, the State's claim to recover medical assistance is a lien against proceeds payable to the recipient by liable third parties. Subject to certain conditions, the State may maintain an action on its lien directly against the third party. That section provides that

The department shall mail or deliver written notice of its lien to the third party at its principal place of business or last known address. The notice shall include the recipient's name, the approximate date of injury, a general description [**6] of the type of injury and, if applicable, the general location where the injury is alleged to have occurred.

Utah Code Ann. § 26-19-5(2). This section further provides:

(3) The department may commence an action on its lien in its own name[;] however, that lien is not enforceable as to a third party unless:

(a) the third party receives written notice of the department's lien before it settles with the recipient; or

(b) the department has evidence that the third party had knowledge that the department provided or was obligated to provide medical assistance.

Id. § 26-19-5(3). The obvious purpose of this section is to protect a third party who is unaware of the State's lien and settles with the recipient. That, of course, did not happen here because the State has not brought an action against any third party but has, instead, challenged the disposition of insurance funds that are subject to court approval, making notice to any third party irrelevant.

Additionally, section 26-19-7(1)(a) provides that a recipient "may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an [**7] injury, disease, or disability for which the department has provided . . . medical assistance without the department's written consent." This provision protects both the liable third party and the State from ill-informed or devious action by the recipient.

In the instant case, the conservators assigned certain insurance benefits to DMBA and also sought to settle with several other insurers without the permission of the State. In such an instance, [*442] the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action. The department may recover in full from the recipient all medical assistance which it has provided and retains its right to commence an independent action against the third party.

Utah Code Ann. § 26-19-7(2) (emphasis added). Furthermore, the department has an "unconditional right to intervene in an action commenced by a recipient for recovery of medical costs connected with the same injury, disease, or disability, for which it has provided or has become obligated to provide medical assistance." Id. § 26-19-7(1)(b). Therefore, regardless of whether the State has a valid lien, the recipient's preemptive

[**8] action does not cost the State its right to third-party payments which are in settlement or are already in the hands of the beneficiary. The court of appeals recognized this in *Estate of Higley, 810 P.2d 436 (Utah Ct. App. 1991),* and *Camp v. Recovery Services, 779 P.2d 242 (Utah Ct. App. 1989),* both holding that where the recipient had settled insurance claims without the State's consent, the State could recover full reimbursement from the recipient of its outlay for medical expenses.

The conservators further contended in the trial court, and the court agreed, that any lien the State might have is illegal under *42 U.S.C. § 1396p*(a), which provides that "no lien may be imposed against the property of an individual prior to his death on account of medical assistance paid or to be paid on his behalf under the state plan." The New York Court of Appeals recently addressed this issue in the consolidated appeals of *Cricchio v. Pennisi and Link v. Town of Smithtown, 90 N.Y.2d 296, 683 N.E.2d 301, 660 N.Y.S.2d 679 (1997).* There, the court stated that as a consequence of the mandatory assignment the settlement proceeds are resources of the third party tortfeasor that are owed [**9] to [the state recovery office]. Accordingly, the lien on the settlement proceeds attaches to the property of the third party, and thus does not violate the statutory prohibition against imposing a lien against a beneficiary's property until after his or her death. The flaw in plaintiff's theory that the lien cannot be satisfied until the recipient's death is that it fails to appreciate this critical distinction between the assets of a responsible third party and assets belonging to the Medicaid recipient.

683 N.E.2d at 305 (citations omitted). We agree. Payments made by a third party do not legally become the property of the recipient until after a valid settlement, which necessarily must

include reimbursement to Medicaid. Therefore, we hold that the State has a valid assignment and an enforceable right against third-party recoveries for S.S.'s injury up to the amount of Medicaid assistance paid as of the time of the settlement approval.

III. REIMBURSEMENT OF MEDICARE AND FUNDING OF THE SUPPLEMENTAL NEEDS TRUST

Under the provisions of *42 U.S.C. § 1396p*(d)(4)(A) and Utah Code Ann. § 62A-5-110, a properly drafted discretionary trust, often referred to as a special needs [**10] or supplemental needs trust, may provide resources to a disabled person under sixty-five years of age for care beyond that which Medicaid supplies without defeating the recipient's Medicaid eligibility. By means of such a trust, the sufferer of a long-term disability may enjoy education, rehabilitation, transportation, and other advantages which Medicaid does not cover without losing Medicaid's basic medical benefits. Congress enacted the supplemental needs trust provision as an explicit exception to the general trend of the Omnibus Budget Reconciliation Act ("OBRA") of 1993, which attempted to close loopholes that allowed wealthy elders to reap Medicaid benefits while still retaining their personal wealth and passing it on to the next generation. See generally Stewart Weisner, OBRA '93 and Medicaid: Asset Transfers, Trust Availability and Estate Recovery Statutory Analysis in Context, *19 Nova L. Rev. 679 (1995).*

The supplemental needs trust must be structured so that "upon the death of the beneficiary, the state will receive all amounts remaining in the trust, up to an amount equal [*443] to the total medical assistance paid on behalf of the beneficiary." Utah Code Ann. § 62A-5-110(1)(a)(vi). [**11] The conservators

contend that this provision supersedes sections 26-19-5 and -7, which provide for reimbursement to the State when there has been an insurance recovery such as happened here. Thus the conservators argue that the State is not now entitled to reimbursement, but only after S.S.'s death. The State responds that Medicaid is designed to be the payor of last resort and the establishment of a supplemental needs trust does not change the fact that the mandatory assignment of benefits gives the State a lien on any third-party recovery to the extent of the State's expenditures. The State bolsters its argument with reference to *42 U.S.C. § 1396* (1993), under which the states are required to collect reimbursement for Medicaid assistance from liable third parties. Therefore, the State insists that S.S.'s insurance recoveries may be used to fund a supplemental needs trust only after the State has been reimbursed.

The trial court noted that "the specific provisions of the United States Code, the Federal regulations and State laws pertaining to supplemental needs trusts do not require reimbursement of pre-settlement assistance benefits from petitioners to the State of Utah." However, [**12] the Utah reimbursement provisions are found in the earlier enacted sections 26-19-5 and -7, and the legislature's failure to explicitly reaffirm an earlier statute when it later enacted section 62A-5-110 does not give rise to a presumption of preemption. Rather, a recently enacted statute will supersede an existing statute only in the instance of an irreconcilable conflict between the two.

Though it is true . . . that subsequently enacted statutes generally supersede prior existing ones on the same subject, statutes are not repealed by implication. Even when they seem to overlap in some areas, they should be so construed to give effect to both if possible; and the later statute neither supersedes

nor repeals the prior one unless its terms are irreconcilable with the former statue.

Pride Club v. Miller, 572 P.2d 385, 387 (Utah 1977) (citing *McCoy v. Severson, 118 Utah 502, 222 P.2d 1058 (1950)).* Likewise, a federal statute will preempt a state statute only in the case of an actual conflict unless the federal statute has been shown to preemptively occupy the field, which has not occurred here. We find no irreconcilable conflict here either on the federal or state level, [**13] or between the two, because the Medicaid recovery statutes deal with reimbursement, while the discretionary trust statutes address Medicaid eligibility. Thus we may conclude, without doing violence to either statute, that recoveries from third parties liable for the same expenses covered by Medicaid belong to the State, but any remaining balance not owed to the State may be used to fund a properly structured supplemental needs trust. Such a trust will permissibly expand the resources available for the disabled person's care beyond that which the Medicaid eligibility provisions would ordinarily allow without defeating eligibility. In the words of the Cricchio court:

There is no indication that the amendments were designed to alter the legal liability of any responsible third party to reimburse Medicaid for care, which is a cornerstone of the Medicaid program. Rather, the legislative history of the Acts auth izing the creation and favorable treatment of assets held in an SNT reveals that the amendments were prompted by the sole desire to encourage families to undertake long-term financial planning for loved-ones with family assets that were not otherwise earmarked "to reimburse [**14] government assistance."

Cricchio, 683 N.E.2d at 305 (citing Bill Jacket, L. 1993 c. 433, Mem. in Support.) n2 We therefore hold that repayment of the Medicaid lien from third party settlement funds must precede creation of the supplemental needs trust.

n2 "Supplemental needs trusts would be created with 'funds the State would not obtain to reimburse itself for public assistance in any event.'" Id.

IV. OFFSET AND CREDIT

Finally, the conservators assert that if reimbursement to the State is required, they should be entitled to a partial offset equal to [*444] the State's proportionate share of attorney fees and costs. They also contend that they are entitled to a credit for certain support payments made by Richard S. to the State. Since the trial court denied any recovery by the State, these issues were not reached and ruled upon by that court. The conservators are free to raise them on remand.

CONCLUSION

We conclude that the insurance benefits were effectively assigned and that repayment of previous [**15] Medicaid expenditures takes priority over the use of the insurance benefits to establish a supplemental needs trust. Therefore, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Justice Zimmerman and Justice Russon concur in Chief Justice Howe's opinion.

DISSENT BY: DURHAM

DISSENT:
DURHAM, Justice, dissenting:

The majority holds that the State may enforce a statutory lien for past Medicaid benefits on settlement proceeds designated (by court order) for a supplemental needs trust created pursuant to section 62A-5-109(2). I respectfully dissent; that result is contrary to both federal and state law.

Both Congress and the Utah Legislature have enacted provisions explicitly authorizing the sheltering of assets to be used for the care of disabled individuals from execution by the State for past, present, or future Medicaid benefits until after the death of the disabled individual. Those provisions, detailed hereafter, were enacted subsequent to, and separately from, the general provisions contained in OBRA '93 and Utah's Medical Benefits Recovery Act. The explicit protections designed for these sources of support for disabled persons [**16] supersede and take precedence over the generic collection schemes otherwise applicable to Medicaid reimbursements. All of the third-party reimbursement provisions on which the State relies in this case are part of the general collection scheme to which the supplemental need trusts provisions are a later, and explicit, exception.

The majority finds "no irreconcilable conflict" between the general reimbursement statutes and the subsequently enacted exceptions for supplemental needs trusts because "the Medicaid recovery statutes deal with reimbursement, while the discretionary trust statutes address Medicaid eligibility." This assertion is not entirely accurate, and certainly not dispositive. The federal exemption language appears in *42 U.S.C. § 1396p*(d)(4). Subsection (d) does indeed refer to determining an individual's eligibility for benefits. But subsection (d) is itself

a subsection of section 1396p, entitled "Liens, adjustments and recoveries, and transfers of assets." It has five subsections: "(a) Imposition of lien against property of individual on account of medical assistance rendered to him under State plan . . .; (b) Adjustment or recovery of medical assistance correctly [**17] paid under State plan . . .; (c) Taking into account certain transfers of assets . . .; (d) Treatment of trust amounts . . .; and (e) Definitions." The lien restrictions specified in subsection (a) clearly apply to all of the subsequent paragraphs, some of which also deal with eligibility requirements, but all of which deal with property to which the state can properly look for reimbursement of medical assistance amounts paid or to be paid.

In reading section 1396p in its entirety, it is plain that the entire section was designed by Congress to ensure protection of certain types of property in certain circumstances from attachment by the state during the lifetimes of disabled individuals. The lien prohibitions in subsection (a) are as applicable to subsections (b), (c), and (d) as are the definitions in subsection (e). Critically, those definitions specifically describe the type of assets at issue in this case-- settlement proceeds. For section 1396p purposes,

(1) The term "assets", with respect to an individual, includes all income and resources of the individual . . ., including any income or resources which the individual is entitled to but does not receive because of [**18] action . . . .

. . . .

(B) by a person, including a court or administrative body, with legal authority to [*445] act in place of or on behalf of the individual . . . .

Id. § 1369p(e)(1). The settlement proceeds in this case have been ordered by the district court to be placed in a supplemental needs trust established by the properly appointed guardians of S.S. Congress intended such funds to be exempt from attachment during S.S.'s lifetime.

Likewise, it is not the case, as suggested by the majority, that the state statute governing supplemental needs trusts is limited to "eligibility" considerations. Section 62A-5-110 specifically states:

(3) A discretionary trust for a person with disabilities is not liable for reimbursement or payment to the state or any state agency, for financial aid or services provided to that individual . . . .

(4) Property, goods and services that are purchased or owned by a discretionary trust for a person with disabilities and that are used or consumed by a disabled beneficiary shall not be considered trust property that is distributed to or under the control of the beneficiary.

(5) The benefits that a person with disabilities is otherwise legally [**19] entitled to may not be reduced, impaired, or diminished in any way because of contribution to a discretionary trust for that person.

Utah Code Ann. § 62A-5-110(3), (4), & (5) (emphasis added). Only subsection (6) of section 62A-5-110 speaks to eligibility. The foregoing provisions, read cumulatively as they must be, reveal an expansive view of the property to be shielded from any form of lifetime attachment by the State for medical assistance.

The discretionary trust in question in this case was properly created, and the transfer of settlement proceeds duly ordered by the district court. There is no question of S.S.'s eligibility as a beneficiary of such a trust, nor of the propriety of placing personal injury settlement funds in it. There is also, in my view, no question of the intent of the federal provisions and the parallel state statutes to shield whatever assets are properly placed in that trust from reimbursement liens by the State during S.S.'s lifetime. The third-party recovery scheme relied on by the state here is part of the overarching scheme for recovery of medical assistance payments paid in the ordinary case. The supplemental needs of trusts provisions are [**20] and were intended to be an explicit, specific, and narrow exception available to persons who are totally disabled--the extraordinary case. It would have been a relatively easy matter for Congress or the legislature to specify that the recovery exemptions in *42 U.S.C. § 1396p*(d) and Utah Code Ann. § 62A-5-110 did not include exemption from the third-party recovery provisions in *42 U.S.C. § 1382* and Utah Code Ann. § 26-19-5. Instead, the exemptions in both the federal and state statutes are blanket exceptions covering all forms of reimbursement, diminution of benefits, liens, or any other process designed to accomplish collection. Once S.S.'s recovery from the persons liable for his injuries was contributed to a properly created supplemental needs trust, the State had no power to attach it until his death, just as is true of any other funds contributed to that trust. The majority agrees with the analysis of the New York Court of Appeals in Cricchio v. Pennisi, 90 N.Y.2d 296, 683 N.E.2d 301, 305, 660 N.Y.S.2d 679 (N.Y. 1997), that "there is no indication that the amendments [creating supplemental needs trusts] were designed to alter" the third-party reimbursement provisions. [**21] I think there is ample indication that the amendments were intended to shelter supplemental needs trust funds from all of

the repayment, reimbursement, and mandatory assignment provisions contained in the earlier statute.

I would therefore affirm the district court.

Justice Stewart concurs in Associate Chief Justice Durham's dissenting opinion.